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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 713

L. R. BROOKS, PETITIONER

vs.

ARCHIE J. DEWAR ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR CERTIORARI FILED JANUARY 24, 1941
CERTIORARI GRANTED MARCH 10, 1941

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 718

L. R. BROOKS, PETITIONER

vs.

ARCHIE J. DEWAR ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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1 [File endorsement omitted.]

In District Court of the Second Judicial District of Nevada, in and for the County of Washoe

No. 53160. Dept. 1

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., A CORPORATION; JOSE SUSTACHA, PAUL GUIDICI, R. W. ANDERSON, J. F. MCKNIGHT, THOMAS W. MCKNIGHT, HARRY E. WEBB, GEORGE M. GLASER, P. J. WOLLMAN, RUTH DE REMER, S. T. WINES, ALFRED W. SMITH, C. H. RAND; JOSE ARRASCADA, DOMINGO ARRASCADA, AND JOHN ARRASCADA, DOING BUSINESS UNDER THE NAME AND STYLE OF ARRASCADA BROS.; J. M. PRUNTY, JOHN M. MARBLE, AND ROBERT E. MARBLE, DOING BUSINESS UNDER THE NAME AND STYLE OF SEVENTY-ONE RANCH, FRANK YATES, EMERY C. SMITH; D. F. GLASER, AND CLARENCE GLASER, DOING BUSINESS UNDER THE NAME AND STYLE OF D. F. AND CLARENCE GLASER; D. M. MCCUISTION, BALBINO ACHABALD, ED E. OLDHAM, SR.; M. B. GOLDSTONE, AND J. SELBY BADT, DOING BUSINESS UNDER THE NAME AND STYLE OF WARM CREEK LAND & LIVESTOCK CO.; H. MOFFAT COMPANY, A CORPORATION, UTAH CONSTRUCTION COMPANY, A CORPORATION, GEORGE HENNEN, JOS. FLYNN, FRED FERNALD, H. A. AGEE, GEORGE M. GLASER, W. H. BLAIR, K. L. REED, LETTIE FILLER, AND LIZZIE WHITNEY; EARL Q. PRUNTY, ALBERT W. GOBLE, JR., C. M. CLAYSON, ELLEN GRIFFIN; J. R. PLUMMER AND EDGAR PLUMMER, DOING BUSINESS UNDER THE NAME AND STYLE OF J. R. AND EDGAR PLUMMER; CHARLES ROCHE AND FRANK ROCHE, DOING BUSINESS UNDER THE NAME AND STYLE OF ROCHE BROTHERS; HORACE C. SHIVELEY; J. C. CUMMINS AND J. W. CUMMINS, DOING BUSINESS UNDER THE NAME AND STYLE OF CUMMINS BROS.; GEORGE A. TERRY, W. R. RAND, HIBERNIA SAVINGS & LOAN SOCIETY, A CORPORATION; S. C. WEEKS AND S. J. WEEKS; A. G. MCBRIDE; BARNEY MONASTERIOR; J. B. GARAT, SR.; GEO. W. GARAT, HENRY S. GARAT AND J. B. GARAT, JR., DOING BUSINESS UNDER THE NAME AND STYLE OF GARAT & CO., PLAINTIFFS.

VS.

L. R. BROOKS, DEFENDANT

Complaint for injunction

Filed June 15, 1936

2 Plaintiffs complain of defendant and for their cause of action and bill of complaint in equity allege:

1. That all of the individual plaintiffs hereinabove named are residents and each of them is a resident of the State of Nevada,

and a citizen of the United States and of said state. Plaintiff Eureka Land & Stock Company is a Corporation organized under the laws of the State of Nevada, with its principal office at Eureka, Eureka County, Nevada, Jose Arrascada, Domingo Arrascada, and John Arrascada are co-partners doing business under the firm name and style of Arrascada Bros., John M. Marble and Robert E. Marble are co-partners doing business under the name and style of Seventy-One Ranch. D. F. Glaser and Clarence Glaser are co-partners doing business under the name and style of D. F. and Clarence Glaser; M. B. Goldstone and J. Selby Badt are co-partners doing business under the name and style of Warm Creek Land & Livestock Co.; H. M. Moffat Company is a corporation organized and existing under the laws of the State of California, and having its principal office in the City and County of San Francisco, State of California, and having and maintaining an office at Reno, Washoe County, Nevada. Utah Construction Company is a corporation organized and existing under the laws of the State of Utah, having its principal office at Ogden, Weaver County, Utah, and maintaining an office at Montello, Elko County, Nevada; J. R. Plummer and Edgar Plummer are co-partners doing business under the name and style of J. R. and Edgar Plummer. Charles Roche and Frank Roche are co-partners doing business under the name and style of Roche Brothers. J. C. Cummins and J. W. Cummins are co-partners doing business under the name and style of Cummins Bros. Hibernia Savings & Loan Society is a California corporation owning property in the State of

3 Nevada. All of the said individuals, partnerships, and corporations now are and for many years continuously last past preceding the commencement of this action have been engaged in the business of breeding, raising, grazing, and selling livestock within the State of Nevada, and within Grazing District No. 1 in said State, hereinafter more particularly described.

4 2. The defendant, L. R. Brooks, is the duly appointed Acting Regional Grazier of the United States for Region Three, which includes the State of Nevada, and is a citizen and resident of the United States and resides in Reno, Nevada. The defendant Brooks is sought to be restrained from enforcing certain rules which the Director of Grazing of the United States has promulgated by the order and with the approval of the Secretary of the Interior of the United States. In promulgating and ordering and approving the promulgation of said rules, the Director of Grazing and the Secretary of the Interior purported to act under authority of the Act of Congress of June 28, 1934 (48 Stat. 1269; 43 U. S. C. A. 315–315n), entitled, "An Act to Stop Injury to the Public Grazing Lands by Preventing

Overgrazing and Soil Deterioration, to Provide for Their Orderly Use, Improvement and Development, to Stabilize the Livestock Industry Dependent upon the Public Range, and for Other Purposes," commonly known as "The Taylor Grazing Act." (Said Act, sometimes hereinafter is referred to as "said Act of June 28, 1934," and a copy thereof is annexed to this Bill of Complaint as "Exhibit A.") In fact, however, said rules are illegal and void because the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate or to order or approve the promulgation of said rules, and therefore the enforcement of said rules, if accomplished, would not be the official act of the United States by its Acting Regional Grazier.

3. The plaintiffs file this Bill of Complaint on behalf of all of the said plaintiffs jointly and on behalf of each and every one of said plaintiffs severally, and on behalf of all persons similarly situated. The interests and the causes of action of the said plaintiffs and the relief sought on behalf of each of said plaintiffs are identical in all respects. The said plaintiffs and those persons similarly situated are so numerous as to make it impracticable to bring all such persons before said court and it is impracticable for each one of said plaintiffs, and every other person similarly situated, to bring a separate action seeking relief similar to that herein prayed for. Unless plaintiffs may bring this action thus on behalf of themselves individually and jointly and on behalf of all persons similarly situated, there will be a multiplicity of suits, and both the plaintiffs and the defendant Brooks will suffer great inconvenience, and additional and unnecessary cost and expense.

4. It is economically impossible for stockmen situated like the plaintiffs to own or lease all the grazing land necessary to feed their livestock. For many years, therefore, it has been the practice of such stockmen to own or lease only a relatively small portion of grazing land, and to use certain vacant, unappropriated, and unreserved public lands of the United States (hereinafter sometimes referred to as "the public range") to satisfy the rest of their grazing requirements. Such stockmen have built up their business in reliance upon their ability to use portions of the public range in this way. The capitalization and indebtedness of such stockmen, the amount of their state and local taxes, their competitive positions relative to other stockmen, the price structure of the market in which they sell their livestock, all have been fixed and determined by the extent to which such stockmen have been able to graze their livestock on the public range. It would be impossible for stockmen situated like the plaintiffs to continue in business if their ability to graze livestock upon the

public range were impaired or interfered with to any appreciable extent.

5. In accordance with the practice described above, the plaintiffs have, since long prior to the passage of said Act of June 28, 1934, been grazing their livestock upon certain portions of the public range in Elko, Eureka, and Lander Counties, Nevada. Each of the plaintiffs owns or leases companionate agricultural and grazing properties used in connection with such use of the public range, and each of the plaintiffs owns vested rights to the use of water on the public range itself for watering livestock. The agricultural and grazing lands which plaintiffs own and lease are entirely inadequate to support their livestock, and it has always been and still is indispensable to the conduct of the plaintiffs' businesses that they be allowed to use the public range in this way. Further, the public range in itself has no value unless used in connection with agricultural and grazing properties of like nature as those owned and operated by the plaintiffs and in connection with the ownership of the right to the use of water for stockwatering purposes, such as the stockwatering rights of plaintiffs. As the value of the ranch properties, livestock, and stockwatering rights of the plaintiffs is dependent upon the use of the public range, so is the value of the public range dependent upon the industries and businesses built up by investment in agricultural and grazing lands, livestock, stockwatering rights, and other operating properties by the plaintiffs and other stockmen similarly situated. During all the times above mentioned, and at least until May 31, 1935, plaintiffs were impliedly licensed by the United States to graze their livestock on said portions of the public range. Except as described hereinafter, the United States has never revoked or modified the said implied licenses of the plaintiffs.

6. In general, the public range in Nevada is the most dependent upon appropriated water and companionate agricultural and grazing lands of any public grazing lands in the United States.

7 The portions of the public range on which plaintiffs graze their livestock are wholly dependent upon appropriated water and companionate lands for economical and beneficial use, and it is necessary to invest large sums in improvements of headquarters units, water rights, winter feed facilities, etc., before livestock can be raised successfully. Most of the cattle produced by plaintiffs and other stockmen similarly situated are what is known as "feeders," that is, cattle which must be fattened in some other section of the country before they are fit for slaughter. Furthermore, because of the erratic production of feed on Nevada ranges due to semiarid climatic conditions and the great extreme of changes in temperature and

moisture, on the average less than twenty out of every hundred head of cattle raised can be marketed as feeders each year and the receipts from these cattle must pay for the expense of supporting the entire one hundred head. The sheep raised by plaintiffs and others similarly situated must be ranged on special lambing grounds in spring; must be "lambed" before shearing or shorn before "lambing," depending entirely on weather conditions; must be taken to the higher mountains for summer range; the lambs shipped to market in Fall; the ewes trailed to the winter range depending while on the trail on snow for watering, and in Spring again trailed north for shearing and lambing. Such perennial trailing to and from one winter range, and such shearing and lambing in adverse weather conditions, often subjects the bands of sheep to losses ranging from a small percentage to as great as seventy-five per cent. In addition to such adverse conditions, when the steers thus raised and the lambs thus raised are ready for market, they must be disposed of irrespective of the prices offered for same. The margin of profit, by reason of such conditions, both as to sheep and cattle, is so small that the imposition of additional charges of overhead or operating costs, even though appearing nominal, threaten to destroy said
8 industries in the said Grazing District No. 1.

7. On April 8, 1935, the Secretary of the Interior, acting under and in accordance with the provisions of said Act of June 28, 1934, issued an order establishing a grazing district to be known as "Nevada Grazing District No. 1," embracing portions of Elko, Eureka, and Lander Counties, Nevada. The said Nevada Grazing District No. 1 included large portions of the public range upon which the plaintiffs had theretofore grazed their livestock under implied licenses from the United States.

8. On May 31, 1935, the Director of Grazing, acting by the order and with the approval of the Secretary of the Interior, and purporting to act under authority conferred upon the Secretary of the Interior by Section 2 of said Act of June 28, 1934, promulgated certain rules entitled, "Circular No. 2 Rules for the Guidance of District Advisors in Recommending the Issuance of Grazing Licenses." (Said rules sometimes hereinafter are referred to as "Said Circular No. 2.") By said Circular No. 2 the Director of Grazing required all persons grazing their livestock within grazing districts to obtain from the Director of Grazing temporary licenses to do so. No fees were to be charged for the temporary licenses required by said Circular No. 2.

9. In accordance with the provisions of said Circular No. 2, plaintiffs, to protect their rights, duly applied for and obtained temporary licenses to graze their livestock upon the public range

until July 1, 1936. Thereafter plaintiffs' temporary licenses were extended until May 1, 1936.

10. On or about January 1, 1936, the Secretary of the Interior called a conference of delegates from each of the grazing districts theretofore created under said Act of June 28, 1934, to be held at Salt Lake City, Utah, on January 13 and 14, 1936. At said conference the Director of Grazing asked the assembled delegates to advise him whether fees should be charged for new temporary licenses to graze livestock within the grazing districts, and, if so, what the amount of the fees should be. The Director of Grazing suggested that it was desirable to charge a uniform fee of five cents per month for each head of cattle and one cent per month for each head of sheep. Thereupon many delegates, and especially delegates from Nevada Grazing District No. 1 objected to the imposition of such fees. In the first place, said delegates pointed out that said Act of June 28, 1934, did not authorize the Secretary of the Interior to charge any fees whatsoever for mere temporary licenses. In the second place, said delegates pointed out that the conditions of various portions of the public range differed greatly one from the other and that all stockmen ought not to be charged the same uniform fees regardless of the portion of the public range where they grazed their livestock. In the third place, said delegates pointed out that as to certain portions of the public range, especially those portions situated in Nevada Grazing District No. 1, a fee of five cents per month for each head of cattle, and a few of one cent per month for each head of sheep, would be utterly unreasonable at the present time, because, under present conditions, the privilege of grazing livestock on such portions of the public range was not worth the payment of such a fee, and because the payment of such a fee would not permit stockmen situated like the plaintiffs to sell their livestock at a profit or to meet competitive conditions, or to obtain the credit necessary to operate their businesses. Nevertheless, the Director of Grazing purported to find that a majority of the delegates present were in favor of charging a uniform fee of five cents per month for each head of cattle, and a fee of one cent per month for each head of sheep, grazed within a grazing district. The Director of Grazing did not attempt to determine the reasonableness or unreasonableness of such a fee as applied to particular portions of the public range.

11. After said conference on January 13 and 14, 1936, and before March 2, 1936, plaintiffs and other stockmen from Nevada Grazing District No. 1 protested repeatedly to the Director of Grazing and to his agents that, as to the portions of the public range on which they had theretofore grazed their livestock, the

proposed fees would be utterly unreasonable. The Nevada State Cattle Association, a trade association representing many of the cattlemen of Nevada, including most of the plaintiffs, repeatedly called attention to the unreasonableness of such a fee in the case of portions of the public range within Nevada Grazing District No. 1. Representatives of the said Nevada Cattle Association interviewed the Director of Grazing in Washington and there submitted to him both oral and written reasons why such a fee would be unreasonable as applied to such portions of Nevada Grazing District No. 1.

12. On March 2, 1936, the Director of Grazing, acting by the order and with the approval of the Secretary of the Interior, and purporting to act under authority conferred on the Secretary of the Interior by Section 2 of said Act of June 28, 1934, promulgated certain rules entitled, "Rules for Administration of Grazing Districts." (Said rules hereinafter sometimes are referred to as "said Rules of March 2, 1936," and a copy thereof is annexed to this Bill of Complaint as "Exhibit B.") By said Rules of March 2, 1936, the Director of Grazing, in spite of the protests and objections described above, purported to provide, among other things:

(a) That the Division of Grazing of the Department
11 of the Interior should issue to certain qualified applicants new temporary licensee to graze livestock upon the public range within the grazing districts theretofore established until the end of the so-called winter grazing season of 1936–1937 or until May 1, 1937, or until the issuance of "permits" within the meaning of Section 3 of said Act of June 28, 1934, whichever should be sooner;

(b) That a fee of five cents per month or fraction thereof for each head of cattle, and a fee of one cent per month for each head of sheep, should be collected from each licensee grazing his livestock on the public range within a grazing district (said fee being sometimes hereinafter referred to as "the grazing fee"); and

(c) That, after the issuance of said new temporary licenses, all stockmen should be prohibited from grazing livestock upon or driving them across the public range within a grazing district without such a license.

13. At the time of the promulgation of said Rules of March 2, 1936, the grazing lands which plaintiffs held in fee of leasehold were wholly insufficient to support their livestock until they were ready for market or for winter feeding on the land of plaintiffs. Unless, therefore, plaintiffs obtained new temporary licenses to graze their livestock upon the public range, said livestock either would have died of starvation or would have become so weakened

and unfit that they could not be sold in the market at any price, otherwise carried over to the winter feeding season upon the lands of plaintiffs. Accordingly, plaintiffs applied for new temporary licenses to graze their livestock upon the public range within Nevada Grazing District No. 1, as required by said Rules of March 2, 1936. Plaintiffs' applications showed
12 that they were duly qualified to obtain such new temporary licenses. On or about May 1, 1936, plaintiffs were notified by the Register of the District Land Office that such new temporary licenses would be granted to them upon the payment of the first instalments, to-wit, one-half of the grazing fees for their respective livestock for the entire grazing season of 1936–1937. On May 25, 1930, the defendant Brooks sent a notice to the plaintiffs and to all other stockmen who had applied for new temporary licenses to graze their livestock on the public range within Nevada Grazing District No. 1. By said notice, (a copy of which is annexed hereto as "Exhibit C") defendant Brooks informed the plaintiffs and such other stockmen that unless they paid the first installments of their 1936–1937 grazing fees and obtained their new temporary licenses by June 15, 1936, they would be considered in trespass under said Act of June 28, 1934, and would be punished by a fine of not more than $500 as provided by said Act.

14. The said Rules of March 2, 1936, are illegal and void because the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate or to order or to approve the promulgation of said rules, in that:

(a) Section 2 of said Act of June 28, 1934, gives the Secretary of the Interior no authority, power, or jurisdiction to issue the temporary licenses required by said Rules of March 2, 1936, or to require such licenses as a prerequisite to grazing livestock on the public range within a grazing district;

(b) Section 2 of said Act of June 28, 1934, gives the Secretary of the Interior no authority, power or jurisdiction to charge
13 any fee whatsoever for the temporary licenses required by said Rules of March 2, 1936;

(c) The new temporary licenses required by said Rules of March 2, 1936, are not permits within the meaning of Section 3 of said Act of June 28, 1934, authorizing the Secretary of the Interior to issue permits to graze livestock upon the public range within grazing districts.

(d) The grazing fees required to be paid by said Rules of March 2, 1936, were fixed without any attempt to determine what would be a reasonable fee in each case, as required by Section 3 of said Act of June 28, 1934. Neither the Secretary of the Interior nor the Director of Grazing nor any other official of the

Division of Grazing of the Department of the Interior ever made any attempt to ascertain the character of the public range used in any particular case, the type of feed thereon, the distribution thereof of water available for livestock, the economic condition of the particular stockmen dependent thereon, the respective abilities of the stockmen dependent thereon to meet commercial competition, the existing market prices for the various types of livestock, the distance of such range from shipping facilities, or any other standard of reasonableness in each case. Instead, they purported to be guided by the proceedings in the above-described conference at Salt Lake City, Utah, on January 13 and 14, 1936, where there had been no determination of the facts as to any particular portion of the public range, and no opportunity for delegates from particular grazing districts to record their dissent from what the Director of Grazing purported to find to be the opinion of a majority of the delegates assembled from thirty-four grazing districts, representing the widest

14 possible variations in the factors which affect the reasonableness of grazing fees. In fact, the various portions of the public range within the various grazing districts vary so widely in quality and general characteristics that a fee which is reasonable as to one grazing district is not reasonable as to another district, and a fee which is reasonable as to one portion of a grazing district is not reasonable as to another portion of the same grazing district. The grazing fees for the season of 1936–1937 assessed against the plaintiffs herein, to wit, five cents per head per month for cattle, and one cent per head per month for sheep, are the same and identical fees as those assessed against persons grazing livestock on the public range in districts in other states in which the value of the use of the range and the value of the feed thereon is many times greater than the value thereof in the portions of the public range allotted to plaintiffs. The portions of the public range sought to be used by the plaintiffs are so dependent, for economical and beneficial use of available feed, upon water rights which are vested in the plaintiffs, and the companionate agricultural and grazing land holdings of said plaintiffs, that the fee required to be paid by said Rules of March 2, 1936, does not represent a reasonable exaction for the privilege of using the range at the present time and under existing conditions. Furthermore, under the conditions described hereinabove in paragraph 7, the additional cost imposed by the grazing fees required by said Rules of March 2, 1936, will make it impossible for plaintiffs and other stockmen similarly situated to sell their livestock at a profit.

15 (e) The new temporary licenses required by said Rules of March 2, 1936, expressly state that they are temporary

and revocable without any qualifications or restrictions upon such right of revocation, whereas Section 3 of said Act of June 28, 1934, requires that the permits which the Secretary of the Interior is authorized to issue thereunder shall be for a fixed period;

(f) None of the new temporary licenses required by said Rules of March 2, 1936, carries with it any right of renewal, whereas Section 3 of said Act of June 28, 1934, provides that permittees complying with the rules and regulations laid down by the Secretary of the Interior shall not be denied the renewal of the permits which the Secretary of the Interior is authorized to issue thereunder, if such denial will impair the value of the grazing units of the permittees when such units are pledged as security for bona fide loans;

(g) Said new temporary licenses provide that the same are revocable without qualification or restrictions on such right of revocation, despite the fact that in the incidental exercise of such new temporary licenses the said licensees will also exercise their vested rights to the use of water on the public range for watering their said stock by reason of the appropriation and use thereof, and by reason of permits to use the same granted by the State Engineer of the State of Nevada, and despite the fact that it is provided in Section 3 of said Act that the same shall not be construed as in any way diminishing or impairing the right to the use of water for such purposes.

(15) Nevertheless, notwithstanding the fact that said
16 Rules of March 2, 1936, are illegal and void, and notwithstanding the fact that the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or to approve the promulgation of, said rules, the District Land Office refuses to issue to plaintiffs their new temporary licenses unless and until the plaintiffs pay the first instalments of their grazing fees for the 1936–1937 grazing season, and the defendant Brooks threatens to enforce said rules by preventing the plaintiffs from grazing their livestock on those portions of the public range in Nevada Grazing District No. 1, heretofore for many years used by them for that purpose, unless plaintiffs pay the grazing fees assessed against them and obtain the new temporary licenses required by said rules; and the defendant Brooks threatens plaintiffs that, if they attempt to graze their livestock on the public range within Nevada Grazing District No. 1 without paying such grazing fees and obtaining new temporary licenses, plaintiffs will be subject to an action for trespass and to a fine of not more than $500 and to the other liabilities and penalties provided in said Act of June 28, 1934.

16. Unless the defendant Brooks is restrained from enforcing said Rules of March 2, 1936, the plaintiffs will be deprived of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, inasmuch as the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or approve the promulgation of, said rules.

17. Unless the defendant Brooks is restrained from
17 enforcing said Rules of March 2, 1936, the plaintiffs will suffer great damage and irreparable injury for which there is no plain or adequate or speedy remedy at law, in that:

(a) Plaintiffs are informed and believe that the defendant Brooks is financially unable to respond in damages for any injury he may inflict on plaintiffs in enforcing, or attempting to enforce, the said illegal and void Rules of March 2, 1936;

(b) If plaintiffs, in order to protect their rights to graze livestock on the public range, pay the grazing fees assessed against them under said illegal and void Rules of March 2, 1936, under protest, there will be no way in which they can recover back such fees in a suit against the United States or against any officer thereof. Under Section 10 of said Act of June 28, 1934, the said grazing fees to be collected from plaintiffs and each of them as aforesaid will be deposited in the Treasury of the United States as miscellaneous receipts, and 25 per centum thereof will be retained by said Treasury; 25 per centum thereof, when appropriated by Congress for the purpose will be expended by the Secretary of the Interior for construction, purchase, and maintenance of improvements; and 50 per centum thereof will be paid by the Secretary of the Treasury to the State of Nevada, and will thereafter be expended as the State Legislature of said State prescribes, for the benefit of the counties in which the said grazing districts are situated. Thus the plaintiffs will have the said 50 per centum of the proceeds of their grazing fees allocated
to and expended within the counties of Elko, Eureka and
18 Lander in said State. The 25 per centum thus retained in the United States Treasury will be subject to the official custody of the Treasurer of the United States. The 25 per centum appropriated by Congress for expenditure by the Secretary of the Interior will be subject to the official control of the Secretary of the Interior. The 50 per centum paid to the Treasury of the State of Nevada will be under the special control and in the official custody of the Treasurer of the State of Nevada until allocated to the respective counties for expenditure as provided in said Act. When said 50 per centum shall be properly allocated to the respective counties, sundry proportions of said 50 per centum will be in the hands of the respective county treasurers

of the respective counties comprising the said Nevada Grazing District No. 1. Each of the said counties is governed by a legislative board known as the Board of County Commissioners, whose resolutions and regulations will govern the expenditure and distribution of the said county's portion of the said 50 per centum allocated to it. Plaintiffs are informed and believe that, unless afforded the relief of injunction as herein prayed, and if they are compelled to pay the said grazing fees under threat of penalties of fine and imprisonment, as well as the prosecution of civil actions against them, and if they are compelled to institute suit to recover back the license grazing fees so paid, they will be obliged, and each of said plaintiffs will be obliged, to bring separate suits against each one of the said several bodies, officials, and political subdivisions receiving a proportionate share of the said grazing fees, thereby necessitating a multiplicity of suits; that the proporton of the proceeds of the grazing fees which would
19 go to the United States and to the State of Nevada could not be collected back by any legal proceeding whatsoever; that if repayment of said fees could be compelled from each of the said respective counties after allocation of their proper proportions to them, such payment would probably not cover the cost, including commissions and fees, involved in the collection thereof, and that by reason of said facts plaintiffs would be, and each of said plaintiffs would be, subjected to great and irreparable injury for which there is and would be no plain or speedy or adequate remedy at law.

(c) If plaintiffs are forced to pay the grazing fees assessed against them under said illegal and void Rules on March 2, 1936, under protest, and to rely on their ability to recover back the sums so paid from the defendant Brooks, or from the various federal, state, and local authorities who receive the proceeds thereof, the plaintiffs will suffer great inconvenience and expense in conducting their businesses during the coming year, and, as to some of the plaintiffs, their businesses will be disrupted entirely, and it will be impossible for such plaintiffs to obtain the money necessary to operate their businesses during the coming year. Each and every one of the plaintiffs, for the purpose of meeting his overhead expenses and operating costs and expenses in the said business of raising and selling livestock, is strictly limited to definite sources of income. As to a large group of said plaintiffs, they are, and each of them is, financed through borrowed money lent to them by the Regional Agricultural Credit Corporation of Salt Lake City, Utah, the Nevada Livestock Production Credit Association, or other
20 similar governmental loan agencies engaged in the business of lending funds of the Reconstruction Finance Cor-

poration of the United States of America, by accepting the notes of said plaintiffs in said class and rediscounting the same with the said Reconstruction Finance Corporation, the Federal Reserve Bank, the Federal Intermediate Credit Bank, or other government bank agencies. Such funds, lent as aforesaid for overhead and operating costs, are limited by what is known as a "Budget Allowance" set up and fixed at the beginning of the loan term, and are allowable and payable in fixed, agreed amounts monthly during said term, and no funds in excess of said budget allowances are available to such plaintiffs. At the time the budgets were fixed and allowed for all plaintiffs in said class, no attempt had been made to levy or to collect any grazing fees as a condition precedent to the right of said plaintiffs to graze their livestock on the public range, and, accordingly, no such item of grazing fees was or is provided for in such budgets. Such plaintiffs in such class have no other means of income and are therefore unable to pay said grazing fees. As to the remainder of said plaintiffs, not financed as aforesaid through such government loan agencies, their sources of revenue for payment of overhead and operating expenses are nevertheless limited to fixed and definite available sums. Such sums in like manner as the available funds of those plaintiffs financed through Government agencies as aforesaid, are definitely allocated to definite overhead or operating expenditures, and there is no surplus or overplus after such allocation and application. Such plaintiffs are entirely unable to pay the said grazing license fees;

(d) If plaintiffs fail to pay the grazing fees assessed against them under said illegal and void Rules of March 2, 1936, and defendant Brooks attempts to enforce said rules, each of the plaintiffs will be subjected to a fine of not more than $500 and to other penalties provided by said Act of June 28, 1934, and plaintiffs will be barred from grazing their livestock on the public range within Nevada Grazing District No. 1. In that event, plaintiffs' livestock will die of starvation, and plaintiffs will lose the large sums of money which they have invested in said livestock, and in agricultural and grazing lands, improvements, water rights, dams, ditches, canals, reservoirs, dipping vats, and other real and personal property.

18. The payments assessed against plaintiffs for the grazing season of 1936–1937 are in the respective amounts for the respective first and second instalments and in the respective total sums as set forth in Exhibit D hereto annexed and hereby referred to and made a part hereof. The respective first and second instalments and totals set forth in said Exhibit D are the amounts claimed to be payable and which remain unpaid

by the respective plaintiffs. In default of the respective payments of the first instalments, where the same are unpaid, and in default of the respective payments of the second instalments, which will become due upon demand of the defendant in the fall of 1936, or sooner, the said plaintiffs will, in accordance with the said rules and notices as set forth in paragraph 12 and 13 of this complaint, be subjected to the penalties, forfeitures of their rights to use the public range, etc., as hereinabove more particularly set forth.

Wherefore, Plaintiffs pray:

First. That a writ of subpoena issue directed to the defendant Brooks, commanding him to appear and answer the allega-
22 tions contained in this Bill of Complaint and to abide by and perform such orders or decrees as the Court or the Judge thereof may make in the premises.

Second. That the Court, upon the final hearing of this cause, adjudge and decree that the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or approve the promulgation of, said Rules of March 2, 1936, requiring the plaintiffs to pay the fees as herein set forth as a prerequisite to grazing their livestock upon the public range within Nevada Grazing District No. 1 under the said temporary revocable licenses.

Third. That upon the final hearings of this cause the defendant Brooks be perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the said grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range, and in default of obtaining a new temporary license as required by said Rules of March 2, 1936.

Fourth. That an order to show cause be issued by said Court, ordering and commanding the said defendant Brooks to be and appear before said Court, at a time and place to be fixed in said order, and then and there show cause why he should not be enjoined and restrained, during the pendency of this action, from the commission of the acts mentioned in paragraph Third of the prayer of this complaint.

Fifth. That a temporary restraining order issue forthwith directed to the said defendant Brooks, enjoining and restraining him, pending the hearing of said order to show cause
23 and until the further order of the court, from the commission of the acts described in paragraph third of the prayer of this complaint.

Sixth. That plaintiffs have such other further and general relief as the nature of the case may require, and as the Court, or Judge thereof, may deem proper.

MILTON B. BADT,
Milton B. Badt,
Elko, Nevada.
Attorney for the Plaintiffs.

DONOVAN, LEISURE, NEWTON & LUMBARD,
WILLIAM J. DONOVAN,
CARL E. NEWTON,
HIRAM E. WOOSTER,
JOHN HOWLEY,
2 Wall Street, New York, New York,
Of Counsel.

24 [*Duly sworn to by Archie J. Dewar; jurat omitted in printing.*]

25 *Exhibit "A" to complaint*

[PUBLIC—No. 482—73D CONGRESS]

[H. R. 6462]

AN ACT

To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: Provided, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law val-

idly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U. S. C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U. S. C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U. S. C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: Provided, however, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such graz-

ing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: Provided, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long

as the emergency exists: Provided further, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

SEC. 4. Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive.

SEC. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

SEC. 6. Nothing herein contained shall restrict the acquisition, granting, or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto.

SEC. 7. That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of

agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: Provided, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

SEC. 8. That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or, when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands: Provided, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: Provided further, That either party to an exchange may make reservations of minerals, easements, or rights of use, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States, the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of the Interior. Where mineral reservations

are made in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State.

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of the district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost.

SEC. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received from each grazing district during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received from each grazing district during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said grazing district is situated, to be expended as the State legislature may prescribe for the benefit of the county or counties in which the grazing district is situated: Provided, That if any grazing district is in more than one State

or county, the distributive share to each from the proceeds of said district shall be proportional to its area therein.

SEC. 11. That when appropriated by Congress, 25 per centum of all moneys received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year is hereby made available for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements; and an additional 25 per centum of the money received from grazing during each fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 50 per centum of all money received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public land laws as to said Indian ceded lands within a district created under this Act shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this Act shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application.

SEC. 12. That the Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this Act, and in the coordination of range administration, particularly where the same stock grazes part time in a grazing district and part time in a national forest or other reservation.

SEC. 13. That the President of the United States is authorized to reserve by proclamation and place under national-forest administration in any State where national forests may be created or enlarged by Executive order any unappropriated public lands lying within watersheds forming a part of the national forests which, in his opinion, can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this Act: Provided, That such reservations or transfers shall not interfere with legal rights acquired under any public-land laws so long as such rights are legally maintained. Lands placed under

the national-forest administration under the authority of this Act shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this Act. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in the executive departments) granted by title 4 of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes," approved March 3, 1933.

SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U. S. C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: Provided, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: Provided further, That any legal subdivisions of the public land, not exceeding one hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section: Provided further, That this section shall not defeat any valid right which has already attached under any pending entry or location. The word 'person' in this section shall be deemed to include corporations, partnerships, and associations."

SEC. 15. The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated in such isolated or dis-

connected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

SEC. 16. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: Provided, however, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

Approved, June 28, 1934.

26 *Exhibit B to complaint*

113954

OFFICE OF THE SECRETARY, DIVISION OF GRAZING
WASHINGTON

RULES FOR ADMINISTRATION OF GRAZING DISTRICTS

(Under the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act)

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Licenses

Licenses issued in 1936 will be operative only during that year or for such part of 1937 as may be considered the "winter grazing season" as determined by local usage, but in no event will extend beyond May 1, 1937.

Such licenses will be revocable for violation of the terms thereof and will terminate on the issuance of permits in a district.

An applicant for a grazing license is qualified if he owns livestock and is:

1. A citizen of the United States of America or one who has filed his declaration of intention to become such, or

2. A group, association or corporation authorized to conduct business under the laws of the State in which the grazing district is located.

The following definitions will be used in issuing licenses only:

Property shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is:

(a) "Dependent" if public range is required to maintain its proper use.

(b) "Near" if it is close enough to be used in connection with public range in usual and customary livestock operations.
27 In case the public range is inadequate for all the near properties, then those which are nearest in distance and accessibility to the public range shall be given preference over those not so near.

(c) "Commensurate" for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate.

Priority of use.—Is such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith.

Issuance of Licenses

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order name, will be considered for licenses:

1. Qualified applicants with dependent commensurate property with priority of use.

2. Qualified applicants with dependent commensurate property but without priority of use.

3. Qualified applicants who have priority of use but not commensurate property.

4. Other qualified applicants.

Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the public range is reached.

Fees

A grazing fee of five (5) cents per head per month or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licenses.

Elections of District Advisors (Omitted)
District Advisors (Omitted)
Hearings and Appeals (Omitted)

General Rules of the Range

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the act of June 28, 1934 (48 Stat. 1269), and shall be operative in all grazing districts in the States of Arizona, California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, and Wyoming.

28 The following acts are prohibited on the lands of the United States in said grazing districts under the jurisdiction of the Division of Grazing of the Department of the Interior.

1. The grazing upon or driving across any public lands within said grazing districts of any livestock without a license.
2. Grazing upon or driving across said grazing district lands of any livestock in violation of the terms of a license.
3. Allowing stock to drift and graze on said district lands without a license.
4. Constructing or maintaining any kind of works, structure, fence, or enclosure without authority of law or license.
5. Destroying, molesting, disturbing, or injuring property used, or acquired for use, by the United States in the administration of grazing districts.

The following rules for fair range practice will be complied with by all licensees within said grazing districts:

1. All licensees will comply with the laws of the State within which the grazing district is located in regard to the number and kind of bulls turned on the range.
2. Crossing licensees shall follow the route prescribed in the crossing license, at a rate of not less than five (5) miles per day for sheep or goats and ten (10) miles per day for cattle and horses.

Procedure for Enforcement of Penalties for Violation of the Rules and Regulations

Section 2 of the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act, provides that "any wilful

violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

The proceedings to prevent trespass and unlawful occupancy and use of the public domain range in violation of the act of June 28, 1934 (48 Stat. 1269), and to enforce the regulation thereunder shall be as follows:

1. The regional grazier shall serve the alleged violator with notice in writing in which reference shall be made to the applicable section of the law or of the regulation alleged to have been violated and reference shall also be made to the acts constituting such alleged violation. Such notice may be served in person or by registered mail, and the affidavit of the person making personal service of the registry receipt shall be preserved. When the alleged violator is charged with unlawfully grazing livestock on the public domain range, said notice will require him to remove said livestock forthwith or within such reasonable time as may be fixed by the regional grazier and specified in said notice.

2. If the owner of the livestock is found upon the public
29 range in violation of the law or of the regulations of the terms of his license and upon whom notice is served as aforesaid fails to remove his livestock within the time specified in said notice, the regional grazier shall forthwith issue an order in writing directed to any grazier, or any other person to be designated by the regional grazier, authorizing and commanding the person to whom the notice is directed to remove said livestock.

3. All violations of the law or any rule or regulation, or of the terms of a license, and any acts done in violation of the act of June 28, 1934 (48 Stat. 1269), or rules or regulations thereunder, shall be immediately reported to the Divisions of Investigations.

Local Associations of Stockmen

Organization.—Qualified applicants in a grazing district may organize a local association, or several associations, according to the classes of livestock, or by community of interest or otherwise.

Articles of Incorporation, Constitutions and By-Laws.—Such associations shall be organized as corporations "not-for-profit," if permissible under the laws of the State in which the grazing district, or the greater part thereof, is situate; otherwise, said

associations may be organized as cooperative, unincorporated associations. In either case the articles of incorporation, the charters, or the constitutions of such associations, together with the by-laws, shall be submitted to the Secretary of the Interior before the organization of the association shall be recognized by the Department of the Interior.

Powers.—Said local associations should be authorized to exercise the following powers:

1. To lease, or otherwise acquire, State, County, privately owned, tax-default, or other lands within or near a district.

2. To make contributions in cash, property, material or labor, toward the administration, protection, and improvement of the district.

3. To construct and maintain fences, wells, reservoirs, and other improvements necessary to the care and management of the livestock grazed in said district, if and when authorized by the Secretary of the Interior.

4. To act in an advisory capacity to the Secretary of the Interior in the administration of grazing privileges on said lands. All recommendations of said association acting in the capacity authorized by this subdivision shall be subject to the rules and regulations for grazing district generally, and shall include the right of a hearing and appeal.

5. To recommend the amount, manner of apportionment, time and method of collection of assessments for strictly association purposes, as well as for the public purposes contemplated by the act of June 28, 1934 (48 Stat. 1269).

6. To make and enter into cooperative agreements with the Secretary of the Interior for any of the said purposes any any other purpose authorized by said Act.

The foregoing rules for administration of grazing districts shall be effective immediately as to all grazing districts now established and to all new grazing districts when established and they supersede Division of Grazing Circulars Nos. 1, 2, 4, and 6 heretofore issued.

F. R. CARPENTER,
Director of Grazing.

Approved March 2, 1936.
HAROLD L. ICKES,
Secretary of the Interior.

31 *Exhibit C to complaint*

018986 N #1.

UNITED STATES DEPARTMENT OF THE INTERIOR,
DIVISION OF GRAZING, BOX 429,
Reno, Nevada, May 25, 1936.

NOTICE

To all those who have been recommended for a 1936 license to graze livestock on the public domain in region 3, comprising: California grazing districts one and two, Nevada grazing districts one and two, and Oregon grazing district one.

Several weeks ago your local U. S. Land Office located in Sacramento for California districts, Carson City for Nevada districts and in Lakeview for Oregon District No. 1, mailed you notices of the amount of fees now due and payable to the U. S. Land Office before grazing license is issued.

If your license is for a three months period of use, or less, the full amount of the fee is payable in advance, but if it is for a period of over three months, you may pay in at lease two instalments each in advance, as outlined, in the notice mailed you by the U. S. Land Office. Should you have stock on the public domain and have not paid the first instalment of the fee and received your license you are technically in trespass. If there is some slight adjustment which you think should be made in your fee or your license, make the first payment in accordance with Land Office instructions, then ask for consideration of the adjustment. After investigation if it is determined that you have been overcharged, you will be given credit for the amount of the overcharge on your second payment, or if you have paid in full, the Land Office will send you a blank to fill out requesting a refund of the amount overpaid.

Your cooperation in this matter of payment of fees and obtaining your grazing licenses is earnestly requested.

In order, therefore, that no undue hardships may be worked upon anyone, you will be given until June 15, 1936, in which to pay your fees to your local Land Office and obtain your licenses. Users of the public domain in any of the above districts who have not obtained their licenses by June 15, 1936, will be considered in trespass which, under the Act of June 28, 1934 (48 Stat. 1269), is punishable by fine of not more than $500.

Please disregard this notice if your fees have been paid and license issued.

L. R. BROOKS,
Acting Regional Grazier.

32 *Exhibit D to complaint*

Name	First installment	Second installment	Total
Archie J. Dewar	$95.38	$95.38	$190.76
Eureka Land & Stock Co	135.00	135.00	270.00
Jose Sustacha	68.13	68.13	136.26
Paul Guidici	18.00	18.00	36.00
R. W. Anderson	75.75		75.75
J. F. McKnight	3.50	3.50	7.00
Thomas W. McKnight	7.50	7.50	15.00
Harry E. Webb	7.88		7.88
George M. Glaser	2.50		2.50
P. J. Wollman	38.50	38.50	77.00
Ruth DeRemer	4.55	4.55	9.10
S. T. Wines	105.00	70.00	175.00
Alfred W. Smith	106.50	106.50	213.00
C. H. Rand	108.50	108.50	217.00
Arrascada Bros	111.00	111.00	222.00
J. M. Prunty	52.50	52.50	105.00
Seventy-One Ranch	1,330.00	1,330.00	2,660.00
Frank Yates	15.75	15.75	31.50
Emery C. Smith	175.00	175.00	350.00
D. F. & Clarence Glaser	210.70	210.70	421.40
D. M. McCuistion	31.50	31.50	63.00
Balbino Achabal	109.75	109.75	219.50
Ed. E. Oldham, Sr	5.50	5.50	11.00
Warm Creek Land & Livestock Co	Paid	87.50	87.50
H. Moffat Company	975.00	975.00	1,950.00
Utah Construction Co	Paid	2,625.00	2,625.00
George Hennen	78.75	78.75	157.50
Jos. Lynn	26.00	26.00	52.00
33 Fred Fernald	25.38	25.38	50.76
H. A. Agee	52.50	52.50	105.00
George M. Glaser	11.00	11.00	22.00
W. H. Blair	43.75	43.75	87.50
K. L. Reed	22.50	22.50	45.00
(Mrs. Lettie Filler & Mrs. Lizzie Whitney)	5.00	5.00	10.00
Earl Q. Prunty	42.38	42.38	84.76
Albert W. Goble, Jr.	15.00	15.00	30.00
C. N. Clayson #2	13.25	13.25	26.50
Ellen Griffin	73.87	73.87	147.74
J. R. & Edgar Plummer	21.99	21.99	43.98
Roche Brothers	12.50	12.50	25.00
Horace C. Shiveley	17.10	17.10	34.20
Cummins Bros	37.63	37.63	75.26
George A. Terry	7.19	7.19	14.38
W. R. Rand	128.30	128.30	256.60
Hibernia Savings & Loan Society	Paid	262.50	262.50
S. C. Weeks and S. J. Weeks	Paid	630.00	630.00
A. G. McBride	Paid	73.50	73.50
Barney Monasterio	41.26	41.26	82.52
Garat & Co	421.82	421.82	843.64
Total	4,890.56	8,447.93	13,338.49

34 In District Court of Washoe County

[Title omitted.]

[File endorsement omitted.]

Summons

Filed June 16, 1936

35 The STATE OF NEVADA SENDS GREETINGS TO SAID DEFENDANT:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but

within said Judicial District, and in all other cases, within thirty days—exclusive of the day of service—and defend the above entitled action.

[SEAL]

E. H. BEEMER
E. H. Beemer,
Clerk of said Court.
By ——— ———,
Deputy Clerk.

Dated June 16, 1936.

MILTON B. BADT,
Elko, Nevada,
Attorney for the Plaintiffs.

DONOVAN, LEISURE, NEWTON & LUMBARD,
WILLIAM J. DONOVAN,
CARL E. NEWTON,
HIRAM E. WOOSTER,
JOHN HOWLEY,
2 Wall Street, New York City, New York,
Of Counsel.

36 *Return*

SHERIFF'S OFFICE,
County of Washoe, State of Nevada, ss.

I hereby certify and return that I received the within Summons on the 16th day of June A. D. 1936 and that I personally served the same upon the within named defendant L. R. Brooks by showing the original Summons to him and delivering to him a copy of the same, in Washoe County, State of Nevada, on the 17th day of June A. D. 1936, and I further return that I delivered to the said L. R. Brooks a certified copy of the complaint in said within entitled action, with a copy of the Summons attached, at the same time and place.

Dated this 17th day of June A. D. 1936.

RAY J. ROOT,
Sheriff of Washoe County, State of Nevada.
By GEO W. LOTHROP,
Deputy.

37 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Demurrer

Filed Oct. 24, 1936

38 Comes now the defendant, and demurs to the complaint of plaintiffs filed herein, and for grounds of demurrer alleges:

I

That the complaint does not state facts sufficient to constitute a cause of action against the defendant.

II

That there is a defect of parties defendant, in that it affirmatively appears upon the face of the complaint that plaintiffs seek to control the actions of the Secretary of the Interior of the United States by injunction; that said Secretary of the Interior has not been joined as a party defendant herein, and is an indispensable party defendant to this action; that said Secretary of the Interior has not voluntarily or otherwise appeared in this action.

III

That there is a defect of parties defendant, in that the bill of complaint affirmatively shows on its face that property rights of the United States of America are involved, and that the said United States of America is an indispensable party defendant in this action.

IV

That the court has no jurisdiction of the person of the defendant, or the subject matter of the action, as the suit is in essence one against the United States of America which has not given its consent to be sued; that property rights of the United States are involved, and the subject matter of the complaint is exclusively within the political division of the Government of the United States, and is not the subject of review by courts.

38a V

That several causes of action have been improperly united, as shown by the face of the complaint.

Wherefore defendant prays that plaintiffs take nothing by their action and that the same be dismissed with costs to defendant.

E. P. CARVILLE,
E. P. Carville,
United States Attorney,
Attorney for Defendant.

39 In District Court of Washoe County

No. 53160

ARCHIE J. DEWAR ET AL.

vs.

L. R. BROOKS

Order overruling demurrer

Dec. 27, 1938

The Court at this time rendered its decision, and ordered that the defendant's Demurrer to the Plaintiffs' Complaint heretofore argued and submitted, be overruled, and the defendant may have up to and including the 20th day of January 1939 in which to answer.

* * * * *

Whereupon, a recess was taken until the further order of the Court.

A. J. MAESTRETTI,
District Judge.

40 [File endorsement omitted.]

In District Court of the Second Judicial District of Nevada, in and for the County of Washoe

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., ET AL., PLAINTIFFS

vs.

L. R. BROOKS, DEFENDANT

41 *Judgment by default*

Filed April 20, 1939

Plaintiffs having filed herein their complaint for injunction on the 16th day of June 1936, and summons having issued on said date and the Court having on said date made and filed its restraining order and order to show cause restraining the defendant herein, his deputies, agents, and all persons acting in privity with him, from barring, or threatening to bar, the plaintiffs or any of them, from grazing their livestock upon the public range within Nevada Grazing District No. 1, and/or prosecuting the said plaintiffs, or any or either of them, under the penal provisions of the act of June 28, 1934, mentioned in

said complaint and commonly known as the Taylor Grazing Act, and/or from commencing any civil action or actions against the plaintiffs, or any of them, for trespass or otherwise under the provisions of said act, for the time and under the conditions more specifically set forth in such restraining order and order to show cause, and providing further that as bond for the issuance of said restraining order the said plaintiffs deposit with the Clerk of this Court the respective amounts then claimed to be due and payable from them to the Department of the Interior for license fees, all of which said sums and amounts were in said order specifically set forth, and which said sums were deposited by plaintiffs with the Clerk as required;

And an order having been made and filed by the above entitled court on the 26th day of June 1936, on petition, notice and bond of the defendant, removing said cause to the District Court of the United States for the District of Nevada;

And the said cause having been thereafter by said United States District Court for the District of Nevada, on motion of the plaintiffs herein, remanded to this Court for further proceedings (16 Fed. Supp. 636);

42 And it appearing that thereafter the plaintiffs in this action were temporarily restrained from further prosecuting the same by an order of the District Court of the United States for the District of Nevada in an action in which the United States of America was plaintiff and plaintiffs herein were defendants, and that thereafter the said last mentioned action was, on motion of the defendants therein, being the plaintiffs herein, dismissed (18 Fed. Supp. 981);

And defendant herein having thereafter appeared in said action in response to the said complaint and summons and order to show cause and served and filed his demurrer to the complaint of plaintiffs herein, and said demurrer having been argued and submitted to the above-entitled Court, Hon. A. J. Maestretti presiding, and said Court having thereafter and on the 28th day of December 1938, made and filed its order herein overruling the said demurrer of defendant to the said complaint of plaintiffs and granting to the said defendant to and including the 20th day of January 1939, within which to answer said complaint; and said Court having thereafter on the 6th day of January 1939, on motion of defendant, made and filed its order herein further extending the defendant's time to answer to February 20, 1939; and said Court having thereafter on February 16, 1939, on motion of defendant, made and filed its order further extending defendant's time to answer to and including the 13th day of March 1939;

And it appearing that in the said proceedings the said plaintiffs were represented by Milton B. Badt, Esq. (Messrs. Donovan, Leisure, Newton & Lumbard, William J. Donovan, Esq., Carl A. Newton, Esq., Hiram E. Wooster, Esq., and John Howley, Esq., of Counsel) and that the said defendant was represented by E. P. Carville, Esq., United States Attorney, and Miles N. Pike, Esq., and Thomas O. Craven, Esq., Assistant United States Attorneys, and thereafter, upon the expira-
43 tion of the term of office of the said E. P. Carville, Esq., by William S. Boyle, Esq., United States Attorney, and John S. Halley, Esq., and Thomas O. Craven, Esq., Assistant United States Attorneys;

And it appearing that thereafter and on the 16th day of March 1939, the said defendant L. R. Brooks, by his Attorney, William S. Boyle, Esq., United States Attorney, in writing, elected to stand upon the said demurrer and not to answer the said complaint but to allow judgment by default to be entered against the said defendant; and it appearing that the said defendant has failed to answer the complaint of plaintiff herein or otherwise further appear or plead in said action within the time provided by law, rule of court, or order of the above entitled Court, or at all;

And it appearing that by reason of the said default of said defendant the allegations of said complaint are taken as confessed and true and that the said defendant has waived findings of fact and conclusions of law;

Now, therefore, on motion of Milton B. Badt, Esq., attorney for plaintiffs, and the Court being fully advised in the premises,

It is hereby ordered, adjudged, and decreed:

1. That the default of the defendant be, and the same hereby is, entered by reason of his failure to answer within the time provided by law and the order of this Court after the overruling of his demurrer to the complaint of plaintiffs herein, and the Clerk of said Court is hereby directed to enter such default.

2. That by reason of said default each and all of the allegations of the complaint of plaintiffs are taken as confessed and true.

3. That by reason of the premises the plaintiffs are entitled to judgment against said defendant as prayed for in their said complaint.

44 4. That the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or approve promulgation of, the rules of March 2, 1936, more particularly described in the complaint herein, requiring plaintiffs to pay the fees as set forth in said complaint and in said rules as a prerequisite to grazing their

livestock upon the public range within Nevada Grazing District No. 1 under the temporary revocable licenses described in said complaint.

5. That the defendant herein be, and he hereby is perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as rquired by said rules of March 2, 1936.

6. That the said rules and regulations in this Order, Judgment, and Decree referred to are as set forth in Exhibit A hereunto annexed and made a part hereof for purposes of reference.

7. That bond for temporary restraining order posted by the plaintiffs herein be, and the same hereby is, exonerated, to-wit, that the sundry sums of money deposited with the Clerk of this Court by the sundry plaintiffs herein as bond for the issuance of the said restraining order herein be returned by said Clerk to the said plaintiffs through their said attorney, and that the said Clerk be, and he hereby is, authorized and directed to return the said moneys, deposited as bond as aforesaid, to Milton B. Badt, Esq., Attorney of record for the plaintiffs herein and to accept and file in the files of said Clerk in said cause the receipt of said attorney for said moneys.

Dated this 20th day of April 1939.

(S) WM. MCKNIGHT,
Judge of said District Court presiding.

45 [Exhibit A omitted. See exhibit B—Printed side page. 26 ante.]

50 [Clerk's certificate to foregoing transcript omitted in printing.]

51 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed June 23, 1939

52 *To the Honorable William McKnight, Judge of said District Court, to the Plaintiffs in the Above-Entitled Action, and to Milton B. Badt, Esquire, Their Attorney, and to William J. Donovan, Carl E. Newton, Hiram E. Wooster, and John Howley, of Counsel for the Plaintiffs:*

You and each of you will please take notice that L. R. Brooks, the defendant in the above-entitled action, hereby appeals to the Supreme Court of the State of Nevada from the judgment in said action rendered in favor of the plaintiffs above-named, and against the defendant, L. R. Brooks, and entered on the 20th day of April 1939 in the records of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and from the whole of said judgment.

Dated this 23rd day of June 1939.

WILLIAM S. BOYLE,
United States Attorney,
JOHN S. HALLEY,
Ass't. United States Attorney.
THOMAS O. CRAVEN,
Ass't. United States Attorney,
Attorneys for Defendant.

53 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Undertaking on appeal

Filed June 23, 1939

54 Whereas, L. R. Brooks, the defendant in the above-entitled action, is about to appeal to the Supreme Court of the State of Nevada, from a judgment rendered against him in said action in the said District Court, and in favor of the Plaintiffs, and entered on the 20th day of April 1939:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, L. R. Brooks as principal, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and qualified to do business in the State of Nevada as surety, do hereby jointly and severally undertake and promise on the part of the appellant, the said L. R. Brooks, that he will pay all damages and costs which may be awarded against him on the appeal, or on dismissal thereof, not exceeding three hundred

($300.00) dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 23rd day of June 1939.

L. R. BROOKS,
Principal.
AMERICAN SURETY COMPANY OF NEW YORK,
By CLARENCE H. PATTEN,
Resident Vice President.
By ALBERT D. AYRES,
Resident Assistant Secretary.

55 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Notice of filing undertaking

Filed June 28, 1939

56 *To the Plaintiffs above-named; to William J. Donovan, Carl E. Newton, Hiram E. Wooster and John Howley, of Counsel for Plaintiffs, and to Milton B. Badt, Esquire, attorney for Plaintiffs:*

You and each of you will please take notice that L. R. Brooks, the defendant herein, did, on the 23rd day of June 1939, file his undertaking for costs on appeal in the above-entitled cause, with the Clerk of said Court.

WILLIAM S. BOYLE,
United States Attorney,
JOHN S. HALLEY,
Ass't United States Attorney,
THOS. O. CRAVEN,
Ass't United States Attorney,
Attorneys for defendant.

57 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Affidavit of service

Filed June 30, 1939

58 STATE OF NEVADA,
County of Washoe, ss:

Juanita Kussell, being first duly sworn, deposes and says that she is a stenographer in the office of the United States Attorney for the District of Nevada, that on the 23rd day of June 1939 she placed in an envelope, upon which the postage had been fully prepaid, a duplicate copy of Notice of Appeal, Undertaking on Appeal, and Notice of Filing Undertaking in the above-entitled matter, which said envelope was addressed to Milton B. Badt, Esq., Elko, Nevada, one of the attorneys for the plaintiffs, and which said envelope, so addressed and containing said copy of Notice of Appeal, Undertaking on Appeal, and Notice of Filing Undertaking, she deposited in the United States Post Office at Reno, Washoe County, Nevada, on the said 23rd day of June 1939.

JUANITA KUSSELL.

Subscribed and sworn to before me this 23rd day of June 1939.

WILLIAM S. BOYLE,
Notary Public,
in and for the County of Washoe, State of Nevada.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

61 [File endorsement omitted.]

In Supreme Court of Nevada

L. R. BROOKS, APPELLANT

vs.

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., ET AL., RESPONDENTS

62 *Notice and motion to remand record*

Filed September 23, 1939

To Plaintiffs and Respondents herein and to Milton B. Badt, Esq., Their Attorney, and to William J. Donovan, Carl E. Newton, Hiram E. Wooster and John Howley, of Counsel for said Plaintiffs and Respondents:

You and each of you will please take notice that L. R. Brooks, defendant and appellant herein, by his attorneys, Miles N. Pike, United States Attorney, Thomas O. Craven, Assistant United States Attorney, and John S. Halley, Assistant United States

Attorney, will, on Wednesday, October 18, 1939, at the hour of ten A. M. of that day, or as soon thereafter as counsel can be heard, at the court room of the Supreme Court of the State of Nevada, at Carson City, Nevada, move the above-entitled Court for an order remanding the transcript of record on appeal heretofore filed in said court in the above-entitled cause, to the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, for amendment and correction in the respects hereinafter indicated. Said motion will be made upon the following grounds: that there was erroneously omitted from said transcript of record on appeal, by the mistake, inadvertence and excusable neglect, of counsel for defendant and appellant, the following documents filed in the lower court upon the following dates:

(1) Notice of Appeal, filed June 23, 1939.

(2) Undertaking on Appeal, filed June 23, 1939.

That the following points, inter-alia, are involved in this said cause:

(1) Whether or not the trial court erred in overruling appellant's demurrer to plaintiff's complaint.

(2) Whether or not the trial court committed error in law.

(3) Whether or not the judgment of the trial court is against law.

63 That without said documents heretofore mentioned being included in said transcript of record on appeal, said transcript of record on appeal does not accurately or fully state the substance of the proceedings relating to the points involved in said cause, and without considering said documents, this Honorable Court cannot pass upon the point or points involved in said cause.

That appellant now seeks to have said omissions and inaccuracies corrected.

That upon said hearing appellant will refer to and use the affidavit of John S. Halley, a copy of which is attached hereto and the testimony of John S. Halley, and all records, papers, and files in this cause in the office of the Clerk of the Supreme Court, and in the files in the office of the Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe.

MILES N. PIKE,
United States Attorney.
One of the Attorneys for Defendant and Appellant.

64 In Supreme Court of Nevada

[Title omitted.]

Affidavit in support of motion for an order correcting and amending bill of exceptions and record on appeal

STATE OF NEVADA,
County of Washoe, ss:

John S. Halley, being first duly sworn, according to law, deposes and says that he is now and continuously at all times since August 22, 1938, has been an Assistant United States Attorney for the District of Nevada, and has, during all of said time, been one of the counsel for L. R. Brooks, defendant and appellant in the above-entitled cause; That affiant is and was, one of counsel who presented the said cause on behalf of defendant in the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, and is particularly familiar with all proceedings had relating to the said cause in the said Second Judicial District Court.

That he is particularly familiar with the transcript of record on appeal and the proceedings had on appeal in the said cause; that said transcript of record on appeal was filed with the Clerk of the Supreme Court of the State of Nevada on July 21,
65 1939, and that a copy of the same was mailed to Milton B. Badt, Esq., Elko, Nevada, of counsel for plaintiffs and respondents on or about July 27, 1939.

That as a result of the mistake, inadvertence and excusable neglect of this affiant, the following papers, records, and documents, to wit: Original Notice of Appeal, and the original Undertaking on Appeal, both filed with the Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe on June 23, 1939, were omitted from the said transcript of record on appeal; that affiant personally supervised the preparation of said record on appeal; that at the time of the making and preparation of the said record on appeal, the said Notice of Appeal and the said Undertaking on Appeal were, and each of them was, then on file and a part of the record of this cause in the District Court of the second Judicial District of the State of Nevada, in and for the County of Washoe; that the said records and documents are an essential and indispensable part of the said record on appeal, to the end that the said cause may be tried upon its merits; that full, true, and correct copies of each of said records and documents are attached to and made part of this Affidavit and are certified as correct copies by this affiant; that the annexed copy of the Notice

of Appeal is marked "Exhibit A" and the annexed copy of the Undertaking on Appeal is marked "Exhibit B"; that the originals of each of two said documents are now remaining on file with the Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the county of Washoe.

That final judgment of the Supreme Court of the State of Nevada has not been made in this cause; that appellant's
66 Opening Brief was filed herein on September 6, 1939, and that on September 11, 1939, the written admission of service of copies of said brief, signed by Milton B. Badt, Esq., of counsel for plaintiffs and respondents, showing such service as of September 9th, 1939, was filed with the Clerk of this Court; that by letter to the United States Attorney at Reno, Nevada, dated September 13, 1939, the said Milton B. Badt, Esq., requested a written stipulation extending the time for the filing of respondent's Answering Brief herein, to and including October 24, 1939, which said Stipulation was signed by said United States Attorney, of Counsel for appellants, and which said stipulation was filed by the Clerk of this Court at the request of said Milton B. Badt, Esq., of counsel for respondents, and order of Court was entered thereon so extending the time for the filing of respondent's Answering Brief, on September 20, 1939; that without the aforementioned papers and records, the record on appeal will not accurately and fully state the proceedings under consideration before the Court; that with the aforementioned records and documents embodied in the record on appeal, the same will accurately and fully state the proceedings under consideration by the Court; that the following points inter-alia are involved in the proceedings:

(1) Whether or not the trial court erred in overruling appellant's demurrer to plaintiff's complaint.

(2) Whether or not the trial Court committed error in law.

(3) Whether or not the judgment of the trial Court is against law.

67 That this is a meritorious appeal; that without the said documents being included, said record on appeal does not accurately or fully state the substance of the proceedings relating to the points involved in said cause; that without considering said documents, the Supreme Court cannot pass upon the point or points involved in said cause; that the allowance of said Court of said amendment will be in the furtherance of justice in that it will make said records speak the truth and that it will enable said appellant to obtain a review of said cause by the Supreme Court upon its merits; that without said correction and amendment, appellant's appeal will be futile and of no substantial avail; that no prejudice will result to plaintiffs and respondents

by the allowance thereof, and that they will not in anywise be adversely affected thereby; that the allowance will enable the Supreme Court to hear, try, and determine the whole case upon its merits.

That said transcript of record on appeal, in its present form, was served upon Milton B. Badt, Esq., of counsel for plaintiffs and respondents, copy of which was mailed to him at Elko, Nevada, on July 27, 1939, by appellant's counsel at Reno, Nevada; that no amendment thereto was proposed by respondents, or defects suggested; that by the mistake, inadvertence, and excusable neglect of appellant's counsel, the said documents were not included in the said transcript of record on appeal, and said mistake was not discovered by petitioner's counsel until after the regular time for including said documents as a matter of right had expired.

Wherefore, affiant prays that the Court make such pro-
68 posed order or orders as may be necessary to the end that the said papers and documents may be, and become, a part of the record on appeal in the above entitled Court and cause.

JOHN S. HALLEY.

Subscribed and sworn to before me this 22nd day of September, 1939.

[SEAL]

CLEMENTINE WESTOVER,
Notary Public in and for the
County of Washoe, State of Nevada.

69 [Exhibit A omitted. Printed side page. 51 ante.]

71 [Exhibit B omitted. Printed side page. 53 ante.]

[File endorsement omitted.]

73 In Supreme Court of Nevada

No. 3287

L. R. BROOKS, APPELLANT

vs.

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., ET AL., RESPONDENTS

74 *Opinion*

Filed Oct. 24, 1940

By the Court, TABER, C. J.:

The Act of Congress commonly known as The Taylor Grazing Act was approved June 28, 1934. (C. 865, 48 Stat. 1269.) It

is entitled, "An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes." As amended and added to, the Act will be found in U. S. C. A., Title 43, c. 8A, §§ 315–315p (1939 Pocket Part), and in 9A, F. C. A., Title 43, §§ 315–315o (and 1940 Pocket Part, pp. 66–67).

The first sentence of section 1 provides, in part: "That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million (amended June 26, 1936, to read "one hundred forty-two million") acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, * * * and which in his opinion are chiefly valuable for grazing and raising forage crops * * *."

Section 2 reads: "The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

75

Section 3: "That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: Provided, That grazing permits shall be

issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied,
76 or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: Provided further, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validity affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create
77 any right, title, interest, or estate in or to the lands."

By Executive Order of the President, November 26, 1934, the public lands of Nevada were withdrawn from settlement, location, sale, or entry, and reserved for classification pending the determination of the most useful purpose of such lands under said Act. Thereafter grazing districts were established in many

western states, including Nevada. Nevada Grazing District No. 1, embracing Elko county and that portion of Eureka and Lander counties north of the Humboldt River, was established April 8, 1935, by order of the Secretary of the Interior. Respondents, plaintiffs in the court below, are graziers in this district.

On May 31st, 1935, the Director of Grazing, acting under said § 2, promulgated certain rules requiring all persons grazing their livestock within grazing districts to obtain temporary licenses. These rules did not require payment of any license fees, and there were no fees for the year 1935. Under said rules, plaintiffs applied for and obtained temporary licenses, and these licenses were thereafter extended.

Upon call of the Secretary of the Interior, a conference of delegates from each of the grazing districts theretofore established was held at Salt Lake City January 13 and 14, 1936. The Director of Grazing asked the assembled delegates to advise him whether fees should be charged for new temporary licenses, and if so, what the amount of the fees should be. The Director suggested a uniform fee of five cents per month for each head of cattle and one cent per month for each sheep. Many delegates, and especially those from Nevada Grazing District No. 1, objected to the imposition of such fees, upon three grounds:
78 (1) that the Grazing Act did not authorize the Secretary to charge any fees whatsoever for temporary licenses; (2) that, as the conditions of various portions of the public range differed greatly from one another, all stockmen should not be charged the same uniform fees regardless of the public range where they grazed their livestock; and (3) that, for certain portions of the public range, especially those situated in Nevada Grazing District No. 1, such fees would be utterly unreasonable because, under conditions then existing, the privilege of grazing livestock on such portions of the public range was not worth the payment of such fees, and because the payment thereof would not permit stockmen situated like the plaintiffs to sell their livestock at a profit or to meet competitive conditions, or to obtain the credit necessary to operate their businesses. The Director of Grazing, however, found that a majority of the delegates were in favor of charging such fees. Plaintiffs' complaint alleges that the Director did not attempt to determine the reasonableness or unreasonableness of such fees as applied to particular portions of the public range.

The Director of Grazing, on March 2d, 1936, promulgated "Rules for Administration of Grazing Districts," which will herein be sometimes referred to as the Rules of March 2d, 1936. Among other things, these rules provided: (a) That the Division of Grazing of the Department of the Interior should issue to cer-

tain qualified applicants new temporary licenses to graze livestock upon the public range within the grazing districts theretofore established until the end of the "winter grazing season" of 1936–1937 or until May 1, 1937, or until the issuance of
79 "permits" within the meaning of Section 3 of said Act of June 28, 1934, whichever should be sooner; (b) That a fee of five cents per month or fraction thereof for each head of cattle, and a fee of one cent per month for each head of sheep, should be collected from each licensee grazing his livestock on the public range within a grazing district; and (c) That, after the issuance of said new temporary licenses, all stockmen should be prohibited from grazing livestock upon or driving them across the public range within a grazing district without such a license.

The first two paragraphs of the Rules of March 2, 1936, read as follows:

"Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

"During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts."

Owing, as plaintiffs allege, to the necessity of protecting their livestock from injury, they applied for new temporary licenses. On or about May 1st, 1936, the Register of the District Land Office notified plaintiffs that new temporary licenses would be granted them upon payment of the first installments for the grazing season of 1936–1937. On May 25th, 1936, defendant Brooks notified plaintiffs and other applicants for new temporary licenses that unless they paid the first installments of their 1936–1937 grazing fees and obtained their new temporary licenses by June 15, 1936, they would be considered in trespass under the provisions of said grazing act, and would be punished by a fine of not more than $500.00 as provided therein.
80 The complaint, which is lengthy, further alleges that in fixing the fees for temporary licenses no attempt was made "to ascertain the character of the public range used in any particular case, the type of feed thereon, the distribution thereof of water available for livestock, the economic condition of the particular stockmen dependent thereon, the respective abilities of the stockmen dependent thereon to meet commercial competition, the existing market prices for the various types of livestock, the distance of such range from shipping facilities, or any other standard of reasonableness in each case."

It is further alleged that the various portions of the public range within the several grazing districts differ so widely in quality and general characteristics that a fee which is reasonable as to one grazing district is not reasonable as to another, and a fee which is reasonable as to one portion of a given grazing district is not reasonable as to another portion of the same district.

Paragraph 6 of the complaint reads as follows: "In general, the public range in Nevada is the most dependent upon appropriated water and companionate agricultural and grazing lands of any public grazing lands in the United States. The portions of the public range on which plaintiffs graze their livestock are wholly dependent upon appropriated water and companionate lands for economical and beneficial use and it is necessary to invest large sums in improvements of headquarters units, water rights, winter feed facilities, etc., before livestock can be raised successfully. Most of the cattle produced by plaintiffs and other stockmen similarly situated are what is known as 'feeders,' that is, cattle which must be fattened in some other section of
81 the country before they are fit for slaughter. Furthermore, because of the erratic production of feed on Nevada ranges due to semi-arid climatic conditions and the great extreme of changes in temperature and moisture, on the average less than twenty out of every hundred head of cattle raised can be marketed as feeders each year and the receipts from these cattle must pay for the expense of supporting the entire one hundred head. The sheep raised by plaintiffs and others similarly situated must be ranged on special lambing grounds in spring; must be 'lambed' before shearing or shorn before 'lambing,' depending entirely on weather conditions; must be taken to the higher mountains for summer range; the lambs shipped to market in Fall; the ewes trailed to the winter range depending while on the trail on snow for watering, and in Spring again trailed north for shearing and lambing. Such perennial trailing to and from one winter range, and such shearing and lambing in adverse weather conditions, often subjects the bands of sheep to losses ranging from a small percentage to as great as seventy-five per cent. In addition to such adverse conditions, when the steers thus raised and the lambs thus raised are ready for market, they must be disposed of irrespective of the prices offered for same. The margin of profit, by reason of such conditions, both as to sheep and cattle, is so small that the imposition of additional charges of overhead or operating costs, even though appearing nominal, threaten to destroy said industries in the said Grazing District No. 1."

It is also pointed out in the complaint that the licenses required by the Rules of March 2, 1936, are temporary and rev-

ocable without any qualifications or restrictions upon such right of revocation, whereas section 3 of the Grazing Act
82 requires that permits shall be for a fixed period; that none of the new temporary licenses carries with it any right of renewal, whereas said section 3 provides that permittees complying with the Secretary's rules and regulations shall not be denied renewal of their permits if such denial will impair the value of the grazing units when pledged as security for bona fide loans; and that plaintiffs' water rights are jeopardized because the temporary licenses are revocable without qualification or restrictions as aforesaid.

The District Land Office has refused to issue plaintiffs their new temporary licenses unless and until the required fees be paid, and defendant has threatened to prevent plaintiffs from grazing their livestock on those portions of the public range in Nevada Grazing District No. 1 heretofore for many years used by them for that purpose, unless such fees be paid; he has further threatened that if plaintiffs attempt to so graze their livestock without payment of the fees, they will be subject to an action for trespass and to a fine of not more than $500.00 and to the other liabilities and penalties provided in the Grazing Act.

Subdivision (c) of Paragraph 17 of the complaint alleges that: "If plaintiffs are forced to pay the grazing fees assessed against them under said illegal and void Rules on March 2, 1936, under protest, and to rely on their ability to recover back the sums so paid from the defendant Brooks, or from the various federal, state, and local authorities who receive the proceeds thereof, the plaintiffs will suffer great inconvenience and expense in conducting their businesses during the coming
83 year, and, as to some of the plaintiffs, their businesses will be disrupted entirely, and it will be impossible for such plaintiffs to obtain the money necessary to operate their businesses during the coming year. Each and every one of the plaintiffs, for the purpose of meeting his overhead expenses and operating costs and expenses in the said business of raising and selling livestock, is strictly limited to definite sources of income. As to a large group of said plaintiffs, they are, and each of them is, financed through borrowed money lent to them by the Regional Agricultural Credit Corporation of Salt Lake City, Utah, the Nevada Livestock Production Credit Association, or other similar governmental loan agencies engaged in the business of lending funds of the Reconstruction Finance Corporation of the United States of America, by accepting the notes of said plaintiffs in said class and rediscounting the same with the said Reconstruction Finance Corporation, the Federal Reserve Bank,

the Federal Intermediate Credit Bank, or other government bank agencies. Such funds, lent as aforesaid for overhead and operating costs, are limited by what is known as a 'Budget Allowance' set up and fixed at the beginning of the loan term, and are allowable and payable in fixed, agreed amounts monthly during said term, and no funds in excess of said budget allowances are available to such plaintiffs. At the time the budgets were fixed and allowed for all plaintiffs in said class, no attempt had been made to levy or to collect any grazing fees as a condition precedent to the right of said plaintiffs to graze their livestock on the public range, and, accordingly, no such item of grazing fees was or is provided for in such budgets. Such plaintiffs in such class have no other means of income and
84 are therefore unable to pay said grazing fees. As to the remainder of said plaintiffs, not financed as aforesaid through such government loan agencies, their sources of revenue for payment of overhead and operating expenses are nevertheless limited to fixed and definite available sums. Such sums in like manner as the available funds of those plaintiffs financed through Government agencies as aforesaid, are definitely allocated to definite overhead or operating expenditures, and there is no surplus or overplus after such allocation and application. Such plaintiffs are entirely unable to pay the said grazing license fees."

It is further alleged that should defendant attempt to enforce the said rules subjecting each of the plaintiffs to a fine and other penalties and barring them from grazing their livestock as aforesaid, "Plaintiffs' livestock will die of starvation, and plaintiffs will lose the large sums of money which they have invested in said livestock, and in agricultural and grazing lands, improvements, water rights, dams, ditches, canals, reservoirs, dipping vats, and other real and personal property."

Defendant demurred to the complaint upon the grounds that, (1) it failed to state a cause of action, (2) the Secretary of the Interior is an indispensable party defendant, (3) the United States is an indispensable party defendant since its property rights are involved, and (4) the court was without jurisdiction because the action is in essence a suit against the United States which has not given its consent to be sued. The demurrer was overruled, and defendant elected not to plead further. Thereupon his default was entered, and the court adjudged that
85 the Director of Grazing and the Secretary of the Interior had no authority to promulgate the rules requiring plaintiffs to pay the fees as set forth in said complaint as a prerequisite to grazing their livestock under the temporary licenses, and enjoined defendant "from barring, or threatening to bar, plain-

tiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as required by said rules of March 2, 1936."

The first point urged on this appeal is that the trial court erred in holding that the United States was not an indispensable party defendant, and in holding that it had jurisdiction over the action which, appellant contends, was in essence a suit against the United States without its consent. With this contention we do not agree. United States v. Dewar et al., 18 F. Supp. 981; Ferris v. Wilbur, 27 F. (2d) 262; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570; Work v. Louisiana, 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

Nor do we find merit in appellant's second specification of error, that the district court erred in holding that the Secretary of the Interior was not an indispensable party defendant. State of Colorado v. Toll, 268 U. S. 228, 69 L. Ed. 927, 45 S. Ct. 505; 28 Am. Jur. 453, § 276, n. 12.

Appellant's third and last specification of error is that the lower court erred in holding that the complaint stated
86 facts sufficient to constitute a cause of action. This specification is based upon the contention that the grazing officials had the authority, under § 2 of the grazing Act, and independent of § 3 thereof, not only to issue temporary licenses and collect grazing fees, but also to collect the very fees prescribed by the Rules, to wit, five cents per head per month, or fraction thereof, for each head of cattle or horses, and one cent per month, or fraction thereof, for each sheep or goat.

In support of appellant's position, it is pointed out that delegations of power such as that in section 2 of the Grazing Act should be broadly construed in order to effectuate the policy and intent of Congress; that besides the wording of the Act itself, the court, in endeavoring to ascertain the intent of Congress, should consider the history and purposes of the Act; that, in providing for the issuance of temporary licenses and collection of fees, the Secretary of the Interior is not acting under section 3 of the Act but under section 2 thereof, and that such action is the only effective means of beginning to carry out the policy and intent of Congress; that in the case of United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 513, language very similar to that of section 2 was held by the Supreme Court of the United States to authorize the charging of fees for the privilege of grazing livestock in the National Forests; that it

must have been apparent to Congress that before the Grazing Act could be administered on a permanent basis, considerable time would elapse; that prompt action was essential in order to protect the public domain from present evils and abuses; that it was imperative that the temporary licenses be re-
87 vocable and carry no right of renewal, because they were to be replaced by permits under section 3, and it was impossible to foretell when that would be; that the language of section 2 is mandatory, while that of section 3 is discretionary; that the issuance of temporary licenses is not expressly prohibited either in section 3 or elsewhere in the Act; that the Act should not be interpreted so as to tie the hands of the Secretary while the necessary data are being collected and studied to afford a basis for the issuance of permits under section 3; that notwithstanding the Secretary was not obliged to follow the procedure set forth in section 3 for fixing the fees to be charged for the temporary licenses, he nevertheless took great care to make sure that the fees would be reasonable by adopting the rates voted by a majority of the hundreds of delegates from the eleven western states at the Salt Lake conference, thus showing that his action was not arbitrary or capricious, but rather an honest endeavor to begin to fulfill the mandate of Congress as required by section 2 of the Grazing Act; that whether the fees are reasonable or not in any given case is not to be determined by what someone else is paying, but what is being paid in the particular case; that if any piece of land is worth grazing on at all, it is worth at least one cent an acre for sheep and five cents an acres for cattle; that the fees collected go right back into the ranges for their improvement and rehabilitation and in order to get the data requisite for the issuance of permits under section 3; that, while some grazing areas are better than others, it must be remembered that more livestock per acre are grazing on such lands than on others where there is less forage, and for this reason it makes no difference whether or not one licensee has
88 better grazing land than another, because the one having the better grazing land grazes more livestock, so that the matter of the reasonableness of the fees equalizes itself; that it makes no difference whether the fees are reasonable in each case or not if they are authorized under section 2; that, in construing the Grazing Act, the court should bear in mind some of the practical problems with which the Secretary was faced; that, after ascertaining which public lands out of the total of 173,000,000 acres were "chiefly valuable for grazing and raising forage crops," he was to set up grazing districts embracing not to exceed 80,000,000 acres; that more than 15,000 persons had been using the public range, grazing thereon more than 8,000,000

livestock annually; that in order to comply with the provisions of section 3, it was necessary to determine which of these persons had priority rights and to what extent; that the capacity of the range in many places had been impaired, and that if these lands were to be restored, and inauguration of protective and rehabilitation measures was immediately necessary, and in the meantime if these ranges were not to be destroyed or the livestock industry disrupted, some temporary modus operandi had to be devised; that the reason of the law should prevail over its letter; that the meaning of parts of a statute should be controlled by the general intent of the whole act; and that the contemporaneous and considered interpretation of an act by the administrative agency charged with its enforcement is not to be lightly disturbed by the courts.

As a further extrinsic aid to construction, appellant urges
89 that temporary licenses and the grazing fees fixed by the Rules of March 2, 1936, have been ratified by Congress. In the first place, Congress, knowing that the public range was being administered by the Secretary of the Interior under the temporary license system and on a fee basis, has for several years appropriated money for range improvements on the basis of the amount of fees collected in the several grazing districts, such fees being the only moneys collected under the authority of the Grazing Act prior to 1939. Secondly, Congress, in June 1936, knowing that the Division of Grazing was operating under a temporary license and fee system, widened the scope of section I of the Act by extending its provisions to a further 62,000,000 acres of the public domain, and at the same time amended four other sections of the original Act, but left sections 2 and 3 unchanged, though aware of the construction which had been placed on them by the Secretary.

Respondents, on the other hand, defending the action of the lower court in overruling defendant's demurrer, contend that section 2 cannot be construed to confer authority to charge fees, because section 3 confers a specific and strictly limited grant of authority so to do; that where an act contains both general and specific provisions relating to a particular subject, the specific provisions must govern in respect to that subject, and this is true even though the general provisions, standing alone, might be broad enough to include the subject to which the more particular provisions relate; that the Rules of March 2, 1936, establishing uniform fees throughout the entire public range,
90 violate that provision of § 3 which requires that the fees are "in each case to be fixed or determined from time to time"; that the licenses, being temporary and revocable, do not provide the stockmen with the certainty of tenure intended by

§ 3; that under the temporary licenses the rights of renewal conferred by the provisions of § 3 have been ignored and destroyed; that the valuable water rights which, under the provisions of § 3, are not to be diminished or impaired, can be destroyed at any time under the temporary licenses; that the Forest Reserve Act, construed by the Supreme Court of the United States in the case of United States, v. Grimaud, supra, conferred only a general power to regulate, and contained no provisions like those in § 3 of the Grazing Act limiting and qualifying the procedure to be followed if the Secretary should choose to license the use of the range; that if § 2 authorizes the Secretary to charge the fees prescribed by the Rules of March 2, 1936, § 3 might as well never have been written; that even if the Secretary was compelled to take steps to protect the range pending the organizing of a permanent system of administration, it cannot be said that it was necessary for him to violate the provisions of § 3 by charging fees for grazing privileges which do not comply with that section.

Respondents point out that the purpose of the Grazing Act, as stated in the preamble, is not only "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration," and "to provide for their orderly use, improvement,
91 and development," but also "to stabilize the livestock industry dependent upon the public range." They argue that the effect of those portions of the Rules of March 2, 1936, which they claim to be invalid is rather to make the livestock industry unstable.

Regarding the reasonableness of the fees, respondents say that the maintenance of competitive conditions between stockmen using the semi-arid lands of Nevada and the stockmen in more fertile state requires the payment of fees commensurate with the grazing value of the public land that is used; that over an area of 162,000,000 acres of land in eleven states, where some of the range is meadow land or fine bunch grass, while other portions are salt grass or alkali flats, the uniform five-cent and one-cent rates cannot be "reasonable in each case." Respondents further call attention to the fact that appellant, by electing not to answer their complaint in the court below, admitted all the material facts therein alleged, including the allegations which, as contended by respondents, show that the fees were unreasonable as to each and all of them.

In appellant's opening brief, counsel refer to the report which Mr. Taylor made in introducing the Grazing Bill in the House of Representatives. 78 Cong. Rec., Part V, pp. 5370–5376. In re-

spondents' brief, counsel quotes from the same report as follows: "Returning to the bill before us I may say this bill originally started with about a dozen lines, just putting all this public domain under the jurisdiction of the Interior Department, to be administered for the general welfare of the Government and for the public good. But we have been adding to it all the time until now the bill contains 10 pages, consisting quite largely
92 of just unnecessary regulations written into the bill. The Secretary could do practically everything that is provided for in the bill if we had simply turned it over to him. Nearly all these things could be provided for by regulations. However, many people are not willing to give just carte blanche provisions of that kind in the bill. They, with some justification, feel that there are some things that they should specifically provide for or reserve in the law itself for their guaranty." 78 Cong. Rec., Part V, p. 5372.

On the oral argument of this case it was stated by counsel for appellant that Mr. Taylor had said it might take forty, fifty, or sixty years to put all the grazing lands under administration. Counsel did not think this statement well founded, and stated that permits under § 3 were already being issued in Colorado and New Mexico. On the other hand, the Act was passed in June 1934, and respondents' counsel point to the fact that in Nevada Grazing District No. 1 the system of temporary licenses is still being employed after six years, and no one can tell how long it will be until permits will be issued in that district. Respondents do not question the right of the Secretary, under § 2, to make rules and regulations as to when stock may and may not graze on the range, where the different kinds of stock may be grazed, and as to following proper range practices in handling the stock. They insist, however, that in making such rules and regulations, the Secretary does not have the right to ignore § 3 or to act entirely independent of that section.

Finally, respondents controvert appellant's contention that the license fees complained of have been ratified by
93 congressional appropriation acts, or by Congress's amendment, in 1936, of various sections of the Grazing Act other than §§ 2 and 3, while leaving these two sections unchanged.

Where the language of a statute is plain, certain and free from ambiguity, judicial construction is unnecessary. But the intention of Congress, as regards the charging of fees for grazing livestock on the public range, is not clear in all respects. We have to consider, on the one hand, the decision of the United States Supreme Court in the case of United States v. Grimaud, construing a provision in the National Forests Act very similar to § 2 of the Grazing Act, as well as the history and purpose of

the latter act, the evils to be remedied by it, and the action of Congress in making appropriations from year to year based on estimates of sums to be collected from the users of the public range. On the other hand, it must be borne in mind that the National Forests Act contained no such special provision relating to the payment of fees as we find in § 3 of the Grazing Act. It is not for this court to say whether it would have been better had Congress specially provided that the Secretary, in the matter of charging fees, could proceed under § 2 without regard to § 3 until such time as sufficient data could be gathered upon which to issue permits and collect fees under the provisions of the latter section. In construing either of these sections, we are not at liberty to disregard the provisions of the other. In seeking the legislative intent, we must look at the whole act, giving effect, if possible, to all its parts and endeavoring to harmonize them.

In a very recent decision of the United States District Court for the District of Nevada it was held that the
94 Rules of March 2, 1936, insofar as they purported to authorize the collection of fees based on the uniform five-cent and one-cent rates, were void. United States v. Achabal, 34 F. Supp. 1. As the Grazing Act is an act of Congress, the Achabal case is entitled to great weight as persuasive authority. Black's Law of Judicial Precedents, § 113, p. 374; United States Law Review, September 1935, Vol. LXIX, pp. 449–454; 14 Am. Jur. 339, § 121; 21 C. J. S. 377, § 206. Whether the Achabal case is absolutely binding on this court need not be determined, because the conclusion arrived at in that case is not at variance with that to which we have come after an independent consideration of the questions presented in the case at bar.

Under § 2 rules may be adopted, consistent with other provisions of the Statute, for the prevention of such evils as overgrazing, for improving range conditions, fixing range boundaries, prescribing the areas which may or may not be grazed, who may make use of the range, the areas which may be grazed by the different kinds of livestock, setting the opening and closing dates of the grazing seasons for cattle and for sheep, requiring proper range practices in handling livestock, and prescribing other regulatory measures. But the charging of fees is not essential to regulation, and even if it be conceded that § 2 authorizes not only the issuance of temporary licenses but also the collection of fees for
95 grazing livestock on the public range, a careful study of the Grazing Act shows, in our opinion, an intention on the part of Congress that all fees collected must be "reasonable fees in each case to be fixed or determined from time to time." We do not feel at liberty to read into the statute a provision that fees fixed upon any other basis may be collected for an indefinite

number of years until the desired data be collected for issuing permits and collecting fees under § 3.

Appellant contends that as § 3 merely authorizes the issuance of permits upon the payment of reasonable fees in each case, it is discretionary with the Secretary whether he will proceed under that section, and that he is thus left free, on the authority of United States v. Grimaud, to charge fees under § 2, independently of the limitations in § 3. We do not so read the statute. In our opinion, the authority to issue permits "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time" excludes the right to collect grazing fees not based on a system conforming to that limitation.

Whatever may be said in favor of the uniform rates approved by a majority of the delegates to the Salt Lake City conference, they do not conform to the limitations prescribed in § 3. The idea of fees determined on the basis of uniform rates for livestock grazing on the millions of acres of public range land scattered througout eleven western states, without taking into consideration the different conditions to be found in various portions of this vast domain, cannot be reconciled with the idea of "reasonable fees in each case to be fixed or determined from time to time." It is a matter of common knowledge among the stockmen of the far western states that the base rates on grazing
96 fees in the national forests are not the same in every national forest, either for cattle or sheep. The fact that more livestock are allotted to areas producing good forage than to grazing areas of poorer quality does not operate to equalize the matter of reasonableness of grazing fees. Other factors must be taken into consideration, some of which have been mentioned in the complaint in this action and in the opinion of Honorable Frank H. Norcross in the Achabal case.

In the lower court, defendant did not move to strike out any part of the complaint as being irrelevant or immaterial. N. C. L., 1929, § 8623. Having elected to stand on his demurrer, every relevant and material fact alleged in the complaint must be accepted as true. As we are of the opinion that the complaint states facts sufficient to constitute a cause of action, that the trial court had jurisdiction of the person of the defendant and of the subject matter of the action, and that there is no defect of parties defendant, the judgment appealed from must be affirmed.

The court does not hold, as matter of law, that § 2 of the Grazing Act does not authorize the issuance of temporary licenses or the charging of grazing fees; nor do we determine whether, under the provisions of that section, some system of temporary licenses and payment of fees can be devised which,

even if not entirely perfect, will yet be consistent with § 3. The action of Congress in making appropriations based on estimates of fees to be collected under the licensing system lends considerable support to the view that Congress has ratified
97 the issuance of temporary licenses and the charging of fees to the licensees for grazing their livestock on the public domain; but even if this view were to be accepted, nothing has been presented in this case which would justify us in going further and holding that, regardless of and contrary to the provisions of § 3, the fees could legally be based upon the uniform rate prescribed by the Rules of March 2, 1936, or that any part of said Rules can be held valid if inconsistent with that section or any other provisions of the Grazing Act.

TABER, *C. J.*

We concur:

DUCKER, *J.*

ORR, *J.*

Attest: This is a full, true, and correct copy.

CHAS W. GUTHRIE,
Official Reporter.

97a In Supreme Court of Nevada

No. 3287.

L. R. BROOKS, APPELLANT

vs.

ARCHIE J. DEWAR, ET AL, RESPONDENTS

Appeal from the Second Judicial District Court, in and for Washoe County, Nevada

Hon. A. J. Maestretti, District Judge

Judgment

Oct. 24, 1940

This case came on regularly to be heard on the 18th day of March, A. D., 1940, it being a regular day of the January, A. D., 1940 term of this court, when Hon. Wm. B. Holst, of counsel for appellant, and Hon. Milton B. Badt, of counsel for respondents, both being in court, were each duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day, all and singular the law and the premises having been seen, heard, and duly considered and the court being fuly advised in the law, files with the clerk of this court its opinion in writing by Taber, C. J., concurred in by Ducker, J., and Orr, J., to the effect:

"The judgment appealed from must be affirmed."

Whereupon, it is now ordered, adjudged and decreed as quoted above.

Judgment entered this 24th day of October, A. D., 1940.

Attest: Margaret I. Brodigan, Clerk.

97b [Clerk's certificate to foregoing paper omitted in printing.]

[No. 3287. In the Supreme Court of the State of Nevada. L. R. Brooks, Appellant vs. Archie J. Dewar, et al, Respondents. Copy of Judgment. Filed October 24, 1941. Margaret I. Brodigan, Clerk.]

98 In Supreme Court of Nevada

[File endorsement omitted.]
[Title omitted.]

Order granting motion to remand record

Filed Nov. 15, 1939

Pursuant to stipulation dated November 14, 1939, between appellant and respondents, it is hereby ordered that appellant's pending motion for an order remanding the transcript of record on appeal herein to the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, for amendment and correction, filed herein September 23, 1939, so as to include therein (1) the notice of appeal, filed June 23, 1939, and (2) the undertaking on appeal, filed June 23, 1939, be, and the same is hereby, ordered granted; and

It is further ordered that said record on appeal be returned forthwith by the Clerk of this Court to Honorable E. H. Beemer, Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, with directions to the said Clerk of said District Court to annex to said record on appeal the said notice of appeal, filed June 23, 1939, and the said undertaking on appeal, filed June 23, 1939, and that after annexing said documents to said record on appeal, the said

Clerk of said District Court shall forthwith return said
99 corrected and amended record on appeal to the Clerk of this Court.

Done at Carson City, Nevada, this 15th day of November 1939.

E. J. L. TABER,
Chief Justice, Supreme Court.

Attest: MARGARET I. BRODIGAN, *Clerk.*

100 In Supreme Court of Nevada

[File endorsement omitted.]
[Title omitted.]

Stipulation

Filed Nov. 15, 1939

It is hereby stipulated by and between the parties to the above-entitled appeal, through their respective counsel, as follows:

I

Appellant's pending motion for an order remanding the transcript of record on appeal herein to the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, for amendment and correction, filed herein September 23, 1939, so as to include (1) the notice of appeal, filed June 23, 1939, and (2) the undertaking on appeal, filed June 23, 1939, may be granted.

II

Respondent's pending motion to dismiss the appeal and strike the record on appeal, filed herein October 2, 1939, is hereby withdrawn.

III

The pending motion of Petan Land & Cattle Company to be substituted in the place and stead of J. B. Garat, Sr., et al., doing
101 business under the name and style of Garat & Co., filed herein October 2, 1939, is hereby withdrawn.

IV

The setting of oral argument on the said pending motions for November 15, 1939, may be vacated.

V

Orders may be made by the above-entitled Court in conformance with this stipulation.

Dated this 14th day of November 1939.

MILTON B. BADT,
Of Counsel for Respondents
and Attorney for Petan Land & Cattle Company.

MILES N. PIKE,
United States Attorney
Of Counsel for Appellant.

102 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed March 10, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Nevada is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941